IDEAL CITY DEVELOPMENT SDN BHD v. PWC BINA SDN BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ABDUL RAHMAN SEBLI JCA
MARY LIM JCA
[CIVIL APPEALS NO: B-02(C)(A)-2277-11-2017,
B-02(C)(A)-2278-11-2017 & B-02(C)(A)-2280-11-2017]
9 NOVEMBER 2018

CONSTRUCTION LAW: *Adjudication – Setting aside – Jurisdiction of adjudicator – Claimant issued payment claim before due date for payment – Whether claimant 'unpaid party' – Whether there was cause of action – Whether cause of action had accrued – Whether adjudication non-starter – Whether adjudication within jurisdiction of adjudicator – Whether adjudicator exceeded jurisdiction – Construction Industry and Payment Adjudication Act 2012, ss. 5(1), 15 & 16*

CONSTRUCTION LAW: *Adjudication – Setting aside – Claimant issued payment claim before due date for payment – Whether claimant 'unpaid party' – Whether claimant had necessary locus standi to issue payment claim – Whether there was cause of action – Whether cause of action had accrued – Whether adjudication non-starter – Whether adjudication within jurisdiction of adjudicator – Whether adjudicator exceeded jurisdiction – Construction Industry and Payment Adjudication Act 2012, ss. 5(1), 15 & 16*

The respondent was appointed by the appellant's project architect as the contractor to carry out and complete the superstructure works in a project. According to the respondent, it completed approximately 92.5% of its work scope and the project architect issued a total of 29 progress certificates. However, the appellant failed, refused and/or neglected to make the payments. This prompted the respondent to invoke the adjudication regime under the Construction Industry and Payment Adjudication Act 2012 ('CIPAA') to recover these payments. The respondent issued to the appellant a payment claim for the sum of RM1,743,471.44, in respect of progress certificate no. 29, but the latter did not serve any payment response within the ten-day period allowed under s. 6 of the CIPAA. The respondent served an adjudication claim for, in addition to RM1,743,471.44, an amount of RM2,011,770.42. The adjudicator allowed the adjudication claim. The appellant filed two applications ('the appellant's applications') at the High Court to stay the adjudication decision under s. 16 of the CIPAA and to set it aside under s. 15 of the CIPAA on the grounds that, *inter alia*, (i) the adjudicator acted in excess of jurisdiction; and (ii) the respondent had no *locus standi* to initiate the adjudication proceeding or enforce the adjudication decision. The respondent, on the other hand, filed an application to enforce the adjudication decision ('the respondent's application'). The High Court

dismissed the appellant's applications and allowed the respondent's application. Hence, the present appeals by the appellant against the High Court's orders (i) allowing the respondent's application; (ii) dismissing the appellant's application for stay of adjudication decision; and (iii) dismissing the appellant's application to set aside the adjudication decision.

Held (allowing appeals; setting aside orders of High Court)
Per Mary Lim JCA delivering the judgment of the court:

(1) It is not just anyone who may make a payment claim under the CIPAA regime. Under s. 5(1), and consistent with the object and purpose of the CIPAA, a payment claim may only be made by an 'unpaid party'. The essential characteristic of the 'unpaid party' is the fact that it is a party who claims that it has not been paid, whether wholly or partially, a sum under a construction contract. Such a claim could not be validly raised unless and until the timing for payment has lapsed and the obligation to pay, breached. Where the time period of the date due for payment has lapsed, the party who has not been paid is then the 'unpaid party'. This unpaid party may now properly make a payment claim. (paras 48 & 50)

(2) The due date for payment of the sum specified in the interim progress certificate no. 29 was 6 December 2016. However, without waiting for this date to lapse, on 29 November 2016, the respondent issued and served on the appellant, a payment claim for the payment of the sum of RM1,743,471.44 as certified under interim payment certificate no. 29 dated 25 October 2016. As at 29 November 2016 the payment of this sum was not due. Since the payment of the sum was not due, the respondent could not claim to be an 'unpaid party'. The respondent could only ascribe itself as an unpaid party after 6 December 2016, the due date for payment of interim progress certificate no. 29; even then, only where there is still non-payment after this date. The adjudication regime is not intended to deal with *in futuro* payments (paras 52-54)

(3) The adjudication regime is not intended for all disputes between parties; it is only for payment disputes where either the amounts claimed for works or services rendered were not met in full or in part or where such payments are not regular or timely. In the present appeal, it was a material and relevant consideration and complaint in terms of jurisdiction. The 'adjudication dispute' here that went to the adjudication was not within the jurisdiction of the adjudicator to decide. Although this complaint was not raised in the adjudication proceedings, this complaint raised at the High Court meant that the adjudication in the present appeal was a non-starter. The adjudicator exceeded her jurisdiction and/or committed a jurisdictional error when she adjudicated on a claim which commenced before the date of accrual of the cause of action. (paras 21, 59 & 62)

Bahasa Malaysia *Headnotes*

Responden dilantik oleh arkitek projek perayu sebagai kontraktor untuk menjalankan kerja-kerja suprastruktur dalam satu projek. Menurut responden, responden telah menyempurnakan 92.5% skop kerjanya dan arkitek projek telah mengeluarkan 29 perakuan kemajuan. Walau bagaimanapun, perayu gagal, enggan dan/atau mengabaikan untuk membuat bayaran-bayaran tersebut. Ini menyebabkan responden membangkitkan rejim adjudikasi bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') untuk memperoleh bayaran-bayaran ini. Responden mengeluarkan tuntutan pembayaran terhadap perayu, berjumlah RM1,743,471.11, untuk perakuan kemajuan no. 29 tetapi perayu tidak menyampaikan apa-apa respons pembayaran dalam tempoh sepuluh hari yang dibenarkan bawah s. 6 APAIP. Responden menyampaikan tuntutan adjudikasi untuk, sebagai tambahan pada RM1,743,471.44, satu jumlah RM2,011,770.42. Adjudikator membenarkan tuntutan adjudikasi. Perayu memfailkan dua permohonan ('permohonan-permohonan perayu') di Mahkamah Tinggi untuk menggantung keputusan bawah s. 16 APAIP dan mengetepikannya bawah s. 15 APAIP atas alasan (i) adjudikator bertindak luar bidang kuasanya; dan (ii) responden tidak mempunyai *locus standi* untuk memulakan prosiding adjudikasi atau menguatkuasakan keputusan adjudikasi. Sebaliknya, responden memfailkan satu permohonan untuk menguatkuasakan keputusan adjudikasi ('permohonan responden'). Mahkamah Tinggi menolak permohonan-permohonan perayu dan membenarkan permohonan responden. Maka timbul rayuan-rayuan ini terhadap perintah-perintah Mahkamah Tinggi (i) membenarkan permohonan responden; (ii) menolak permohonan perayu untuk menggantung keputusan adjudikasi; dan (iii) menolak permohonan perayu untuk mengetepikan keputusan adjudikasi.

Diputuskan (membenarkan rayuan-rayuan; mengetepikan perintah-perintah Mahkamah Tinggi)

Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Bukan siapa-siapa sahaja yang boleh membuat tuntutan pembayaran bawah rejim APAIP. Bawah s. 5(1), dan selari dengan objek dan tujuan APAIP, tuntutan pembayaran hanya boleh dibuat oleh 'pihak yang tidak dibayar'. Sifat penting 'pihak yang tidak dibayar' ialah fakta bahawa pihak ini mendakwa tidak dibayar, sama ada sepenuhnya atau sebahagiannya, satu jumlah bawah kontrak pembinaan. Tuntutan sedemikian tidak sah kecuali dan hingga masa bayaran matang dan kewajipan membayar dilanggar. Jika tempoh bayaran perlu dibuat telah tamat, pihak yang belum dibayar ini ialah 'pihak yang tidak dibayar'. Pihak yang tidak dibayar kini boleh membuat tuntutan pembayaran dengan betul.

(2) Tarikh matang bayaran jumlah yang dinyatakan dalam perakuan kemajuan interim no. 29 ialah 6 Disember 2016. Walau bagaimanapun, tanpa menunggu tarikh ini matang, pada 29 November 2016, responden mengeluarkan dan menyampaikan kepada perayu, tuntutan pembayaran untuk bayaran berjumlah RM1,743,471.11 seperti yang diperakui dalam perakuan kemajuan interim no. 29 bertarikh 25 Oktober 2016. Pada 29 November 2016, bayaran jumlah ini belum matang. Oleh kerana bayaran jumlah masih belum matang, responden tidak sepatutnya mendakwa sebagai 'pihak yang tidak dibayar'. Responden sepatutnya menganggap syarikatnya sebagai pihak yang tidak dibayar selepas 6 Disember 2016, tarikh matang bayaran perakuan kemajuan interim no. 29; itu pun hanya jika masih terdapat kegagalan membayar selepas tarikh ini. Rejim adjudikasi tidak diniatkan untuk berurusan dengan bayaran-bayaran masa hadapan.

(3) Rejim adjudikasi tidak diniatkan untuk semua pertikaian antara pihak-pihak; rejim ini hanyalah untuk pertikaian bayaran apabila, sama ada jumlah yang dituntut untuk kerja-kerja atau perkhidmatan-perkhidmatan yang diberi tidak dipenuhi sepenuhnya atau sebahagiannya iaitu apabila bayaran-bayaran ini tidak teratur atau dibuat tepat masanya. Dalam rayuan ini, perkara ini ialah pertimbangan dan aduan material dan relevan dari sudut bidang kuasa. 'Pertikaian adjudikasi' dalam kes ini yang diadjudikasikan bukan dalam bidang kuasa adjudikator untuk putuskan. Walaupun aduan ini tidak dibangkitkan dalam prosiding adjudikasi, aduan yang dibangkitkan di Mahkamah Tinggi ini bermaksud adjudikasi dalam rayuan ini langsung tidak boleh berjalan. Adjudikator melampaui bidang kuasa beliau dan/atau melakukan kekhilafan bidang kuasa apabila beliau mengadjudikasi satu tuntutan sebelum tarikh kausa tindakannya terakru.

Case(s) referred to:

Chip Hup Hup Kee Construction Pte Ltd v. Ssangyong Engineering & Construction Co Ltd [2010] 1 SLR 658 ***(refd)***

MRCB Builders Sdn Bhd v. Southern Builders (J) Sdn Bhd [2018] 1 LNS 1508 CA ***(refd)***

Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case [2017] 1 LNS 177 HC ***(refd)***

View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2017] 1 LNS 1378 FC ***(refd)***

Legislation referred to:

Construction Industry Payment and Adjudication Act 2012, ss. 4, 5(1), (2)(a), 6(1), (3), (4), 7, 9, 10, 15(d), 16, 27(3), 37(1), (2), 41

Building And Construction Industry Security Of Payment Act (Cap 30B) [Sing], s. 15(3)

Other source(s) referred to:

Chow Kok Fong, Lim Chong Fong, Oon Chee Kheng, *Adjudication of Construction Payment Disputes in Malaysia: Navigating the Construction Industry Payment and Adjudication Act*, LexisNexis 2014, p 227

A *For the appellant - GH Tee & Siew Kai Lee; M/s GH Tee & Co*
For the respondent - Daniel Lau; M/s CK Oon & Co

[Editor's note: For the High Court judgment, please see PWC Bina Sdn Bhd v. Ideal City Development (M) Sdn Bhd & Other Cases [2017] 1 LNS 2078 (overruled).]

B *Reported by Najib Tamby*

JUDGMENT

Mary Lim JCA:

C **[1]** These three appeals arose out of an adjudication decision dated 22 May 2017 that was rendered in the respondent's favour. The respondent applied to enforce the adjudication decision *vide* BA-24C-31-06-2017 whilst the appellant filed an application *vide* BA-24C-32-06-2017 to set aside that adjudication decision. In BA-24C-31-06-2017, the appellant filed an application to stay the adjudication decision pending final determination by arbitration – encl. 5.

D

[2] All three applications were heard together, with the court proceeding first with the appellant's application to set aside the adjudication decision (BA-24C-32-06-2017).

E **[3]** After hearing the parties, the learned judge dismissed both applications filed by the appellant while the respondent's application for enforcement was allowed. The appellant appealed against all three decisions.

[4] All three appeals were heard together, namely:

F (i) B-02(C)(A)2277-11-2017 – appeal against the order allowing the respondent's application to enforce the adjudication decision;

(ii) B-02(C)(IM)2278-11-2017 – appeal against the order dismissing the appellant's application for stay of adjudication decision;

G (iii) B-02(C)(A)2280-11-2017 – appeal against the order dismissing the appellant's application to set aside the adjudication decision.

[5] The parties agreed to proceed with the third appeal, the outcome of which will have a bearing and determination of the remaining two appeals. We, too agreed.

H **[6]** After due consideration of the arguments and the records of appeal in respect of this third appeal, we unanimously allowed the appeal and set aside the adjudication decision dated 22 May 2017. Following this decision, the remaining two appeals were allowed and the respective orders of the High Court were accordingly set aside.

I

The Adjudication

[7] By letter of award dated 10 March 2014 and on behalf of the appellant, Akipanel Architects Sdn Bhd (the project architect) appointed the respondent as the contractor to carry out and complete the super-structure works in the project known as "cadangan membina (1) 9 unit kedai pejabat tingkat bawah; (2) 9 unit kedai pejabat dan pejabat pengurusan tingkat 1; (3) 10 unit kedai pejabat tingkat 2; (4) 16 unit F&B dengan roof garden tingkat 3; (5) 1 unit medan selera dan 8 unit kiosk tingkat 4; (6) 183 unit pejabat tingkat 5 – tingkat 16; (7) 1 tingkat "Sky Garden" dengan kolam renang & kemudahan; (8) 1 unit pencawang elektrik dengan 1 tingkat tempat letak kereta bawah tanah sub basemen di atas Lot PT3685, Jalan SS6/3 Bandar Petaling Jaya, Daerah Petaling, Selangor Darul Ehsan untuk Ideal City Development Sdn Bhd", for the contract sum of RM39,085,000 (letter of award). The respondent accepted the appointment on 20 March 2014. The contract works was based on the agreements and conditions of PAM Contract 2006 (With Quantities).

[8] The respondent claimed that it had duly carried out the contract works. As at 25 November 2016, the respondent claimed that it had completed approximately 92.5% of its work scope as certified in the interim certificate of valuation no. 31 dated 21 December 2016 issued by YCL Consult, the project quantity surveyor.

[9] The respondent further claimed that as at 29 November 2016, the project architect had issued a total of 29 progress certificates. Despite the issuance of these progress certificates, the respondent claimed that the appellant had failed, refused and/or neglected to make payment in respect of the sums certified.

[10] The respondent invoked the adjudication regime under the Construction Industry and Payment Adjudication Act 2012 (CIPAA 2012) to recover such payment. On 29 November 2016, the respondent as claimant, issued to the appellant, as respondent, a payment claim seeking payment of the sum of RM1,743,471.44 as certified under interim payment certificate no. 29 dated 25 October 2016 and payable pursuant to cl. 4 of the letter of award.

[11] The respondent did not serve any payment response within the ten day period allowed under s. 6 of CIPAA 2012.

[12] On 18 January 2017, the respondent served a notice of adjudication on the appellant. On 23 March 2016, the respondent served an adjudication claim (pp. 1-13 of core bundle no. 1). At para. 10, the respondent reiterated its claim that it "had completed around 92.5% of its work scope (not including the works in the scope of several nominated sub-contractors ("NSCs")) as certified in the Interim Certificate of Valuation No. 31 dated 21 December 2016 issued by YCL Consult, the project quantity surveyor."

At para. 11, the respondent stated that:

> In addition to the Claimant's present adjudication claim against the Respondent in respect of Progress Certificate No. 29 for the sum of RM1,743,471.44, the Claimant had initiated another adjudication claim reference no. KLRCA/D/ADJ-0625-2016 with a total amount claimed of RM2,011,770.42 in respect of Progress Certificate No. 26, 27 and 28.

[13] In its adjudication response, details of which may be seen at pp. 14 to 48, the appellant:

(i) recorded its protest to the adjudication proceedings, that "its participation in this adjudication proceeding is under protest and shall be without prejudice to the respondent's right to raise jurisdictional objection and challenge;"

(ii) claimed that the purported appointment of the adjudicator by the Director of KLRCA was null and void;

(iii) claimed that the subject matter of the adjudication proceedings is not a fit and proper case to be referred to adjudication and is also an abuse of process because adjudication should have been initiated pursuant to cl. 34.1 of PAM Contract 2006 where the correct and proper appointing authority is the President of Pertubuhan Arkitek Malaysia and not, the Director of KLRCA; that both parties have mutually agreed to refer the disputes on Progress Certificate No. 29 to arbitration and that a sole arbitrator had already been appointed; and that the subject matter of the adjudication proceedings is beyond the adjudicator's jurisdiction;

(iv) relied on various provisions in the PAM Contract 2006 to set-off and deduct for liquidated damages on account of delay by the respondent in completing the works (project architect had issued a certificate of non-completion certifying that the claimant failed to complete the works by the extended completion date) after terminating the respondent's contract pursuant to cl. 25 of PAM Contract 2006;

(v) claimed that by reason of such set-off and deduction, there was no amount payable in respect of progress certificate no. 29.

[14] The respondent served an adjudication reply where the various bases relied on by the appellant were refuted, and where the allegation of abuse of process was denied.

[15] In her decision, the learned adjudicator dealt with the jurisdictional challenge; that relying on ss. 27(3) and 37(1) and (2) of CIPAA 2012, she may nevertheless proceed with the adjudication proceedings. Under s. 37, a dispute may be referred concurrently to adjudication, arbitration or the court – see pp. 54 and 55 of the core bundle.

[16] As for the adjudication claim, the learned adjudicator allowed the adjudication claim together with interest, explaining *inter alia* that:

> Interim Certificate No. 29 which was issued on 25 October 2016 was due to be paid by the Respondent to the Claimant by 06 December 2016 pursuant to Clause 4.1 of the Letter of Award. And yet, the payment was ignored with arguments later by the Respondent that the sum was not payable upon the determination of the Contractor/Claimant on 17 January 2017.
>
> Not only is the Respondent's above argument in contradiction of the CIPAA 2012 principle of 'PAY FIRST ARGUE LATER', the Employer/Respondent had imposed a payment condition on ALL claims for payment including those for work done in the past which is against the conditional payment provision under s. 35(1) of CIPAA 2012.

Proceedings At The High Court

[17] The appellant filed two applications before the High Court. First, was to stay the adjudication decision under s. 16 of CIPAA 2012; the other was to set it aside under s. 15. The respondent filed an application to enforce the adjudication decision when the appellant did not pay, as directed by the adjudicator.

[18] In the application to set aside the adjudication decision under s. 15 of CIPAA 2012, the appellant cited the following grounds:

(i) that the appointment of the adjudicator was null and void;

(ii) that the adjudicator had acted in excess of jurisdiction;

(iii) that there was a denial of the rules of natural justice;

(iv) that there was an absolute assignment of the respondent's rights to United Overseas Bank (UOB); that the respondent had no *locus standi* to initiate the adjudication proceeding or enforce the adjudication decision.

[19] The application to set aside the adjudication decision was dismissed; and so was the application for stay. The respondent's application for enforcement was then allowed.

Deliberations Of The Court Of Appeal

[20] The same grounds that were canvassed before the learned judge were relied on in this appeal. Having examined them, we find that the learned adjudicator had acted in excess of jurisdiction and that the adjudication decision ought to and must be set aside. That being the case, we do not see any need to go into the other grounds relied on by the appellant save to say that those grounds are not sustainable. In that regard, we agree with the learned judge on her reasoning when rejecting those grounds.

[21] However, in respect of the complaint that there was excess of jurisdiction in that the adjudication proceedings related to a premature claim or that the adjudication was commenced prematurely, we disagree with the learned judge. We find that the adjudicator had exceeded her jurisdiction and/or committed a jurisdictional error when she had adjudicated on a claim which commenced before the date of accrual of the cause of action.

These are our reasons on the issue of excess of jurisdiction.

[22] Section 15 of CIPAA 2012 provides as follows:

> Improperly procured adjudication decision
>
> 15. An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
>
> (a) the adjudication decision was improperly procured through fraud or bribery;
>
> (b) there has been a denial of natural justice;
>
> (c) the adjudicator has not acted independently or impartially; or
>
> (d) the adjudicator has acted in excess of jurisdiction.

[23] On the ground of excess of jurisdiction as provided in s. 15(d), the Federal Court in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2017] 1 LNS 1378 had expressed the view that it is a ground that may be raised at the adjudication proceedings, even if it was not raised in the payment response. In fact, it was a ground properly relied on to set aside the adjudication decision under s. 15 of CIPAA 2012.

[24] In *View Esteem*, the adjudicator had declined to consider the defences raised in the adjudication response because there was no payment response filed. The appellant complained that this refusal was in breach of the rules of natural justice and the adjudication decision reached, one which was in excess of jurisdiction.

[25] The Federal Court agreed with the appellant. The Federal Court recognised that "the "jurisdiction" spoken of in s. 15(d) of CIPAA are in circumstances where CIPAA applies and where there is a dispute if the adjudicator has kept himself within his jurisdiction." It was the understanding of the Federal Court that the term "jurisdiction" used in CIPAA 2012 was "in relation to matters within the scope of CIPAA".

[26] The Federal Court also explained the differences or the divide between "power" and "jurisdiction", that "jurisdiction" relates to "the types of subject matter which the court may deal with" whereas "powers may be exercised only in relation to that jurisdiction" before concluding that "… in the absence of a prohibitory clause similar to s. 15(3) of the Singapore Act 2006 and a similar restriction as above mentioned in the NSW legislation,

there is no impediment for the adjudicator to consider all the grounds of claim in an adjudication claim under s. 9 of CIPAA, and all the grounds of defence in an adjudication response under s. 10 of CIPAA."

[27] The Federal Court found that since the claim in question (progress claim no. 28 for the sum of RM23.8 million) was the subject matter of the claim in an action that was already filed in court before the coming into force of CIPAA 2012, the Act did not apply. Section 41 of CIPAA saved this claim by excluding it from the operation of the Act. Once the Act does not apply to the claim in issue in the adjudication proceedings, then there is want of jurisdiction and any decision made may be challenged on the grounds of acting in excess of jurisdiction.

[28] From a careful reading of the reasoning of the Federal Court, it is the decision of the Federal Court that a challenge on jurisdiction may be raised in court to set aside an adjudication decision whether the complaint on jurisdiction relates to the scope of application of CIPAA 2012, or a complaint that there is an absolute lack of jurisdiction. Insofar as the latter is concerned, such a complaint "may be taken up at any time", citing *Chip Hup Hup Kee Construction Pte Ltd v. Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 in support.

[29] In our present appeal, the complaint on jurisdiction is in the sense of the claim being premature was a complaint that was not raised before the learned adjudicator, and therefore never determined. From our appreciation of the arguments, this issue of jurisdiction is one which is properly taken in an application made under s. 15(d) of CIPAA 2012; and is in fact a challenge which may be raised at any stage.

[30] From the records of appeal, it is patently clear that the adjudication proceedings in the instant appeal relate only to Interim Progress Certificate No. 29 dated 25 October 2016. The terms "interim progress certificate", "interim certificate" and "payment certificate" are used interchangeably by both parties, whether in the submissions or in the documents found in the records of appeal. Nothing turns on the different terms used. It refers to one and the same.

[31] As mentioned by the respondent, cl. 4.1 of the letter of award requires the payment of the sum specified in the progress certificate to be done 30 working days from the date of the payment certificate:

> 4.0 Payment Claim and Payment
>
> 4.1 All claims for works done on site shall be progressively on monthly basis. The claims shall to be submitted to the Architect and carbon copy to the Quantity Surveyors for their assessment and valuation for payments.

A The period of honouring the Interim Certificate is thirty (30) working days from the date of the Payment Certificate. The retention sum on each certification shall be at 10.0% to the limit of 5.0% of the agreed contract amount.

[32] Since interim progress certificate no. 29 is dated 25 October 2016, the B 30 working days from the date of this certificate means that this progress or payment certificate must be honoured by 6 December 2016. This date was the specific finding of the learned adjudicator based on the construction and application of cl. 4.1 of the letter of award read together with cls. 3.1 and 3.7 – see pp. 2 and 3 of the adjudication decision. At p. 3, the learned C adjudicator said:

Due Date for Payment	Based on the conditions of payment for progressive claims mentioned above: Payment Certificate No. PJCD360-CIC-029(B) dated 25 October 2016 for D RM1,743,471.44 was due to be paid by the Respondent to the Claimant on **06 December 2016.**

[33] Before us, the respondent accepted that the due date for payment of payment certificate no. 29 is 6 December 2016.

E **[34]** The payment claim in this appeal was served on the appellant on 29 November 2016, before the due date for payment. The appellant submitted that the payment claim was premature in which case, the adjudication decision that was subsequently arrived at in respect of this payment claim is one made in excess of jurisdiction.

F **[35]** The respondent accepts that the payment claim was served on the appellant on 29 November 2016; before the date due for payment.

[36] It is the submission of the respondent that regardless that state of affairs, the appellant is not entitled to rely on this ground because this issue G of the claim being premature was never raised in the adjudication proceedings. Further, the issue became academic because from the date of the initiation of the adjudication, the appellant failed and/or refused to honour interim payment certificate no. 29. The respondent argued that it would be wasteful, both in terms of time and costs, to require another adjudication to H be initiated. This was said to "defeat the intention of CIPAA 2012". Yet, another line of argument was this - that another adjudication initiated for the same certificate after it became due, would have made similar findings of fact, that there is no prejudice occasioned as the imposition of interest is from the date when the payment was due; that there is no statutory provision whether in s. 5 or anywhere else in CIPAA 2012 that requires the payment I to be mature and due before becoming the subject matter in an adjudication proceedings.

[37] The learned judge agreed with the respondent, choosing to adopt the decision in *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case* [2017] 1 LNS 177; [2017] MLJU 242, and the views expressed by Ivan Loo and Lam Wai Loo, learned authors of *Construction Adjudication in Malaysia*.

[38] With respect, we disagree. In considering whether the learned adjudicator has exceeded his jurisdiction, it is necessary for the court to review the underlying facts and law which pertain to jurisdiction.

[39] The primary object of CIPAA 2012 is "to facilitate regular and timely payment." In order to do this and thereby deal with the problem of non-payment of claims for work or services rendered under a construction contract, the Act seeks "to provide a mechanism for speedy dispute resolution through adjudication, and to provide remedies for the recovery of payment in the construction industry". It is not in dispute that the underlying contract in this appeal is a construction contract as defined in s. 4. This means that as a starting point, the adjudication mechanism is available to the contracting parties.

[40] However, before the adjudication mechanism may be properly invoked, there is a preliminary process that must first be pursued. The failure to pursue this process has a serious impact on any adjudication proceedings which is subsequently initiated. The preliminary process relates to the establishment of a dispute, and this can be found at ss. 5 to 7 of CIPAA 2012.

[41] It all starts with a payment claim, the requirements of which may be found in s. 5. It is the unpaid party who serves on the non-paying party a payment claim.

[42] On receipt of the payment claim, the non-paying party has various options available: from admission and payment under sub-s. 6(1) to dispute either the whole or part of the amount claimed through a document known as a "payment response". There are timelines prescribed for all these steps.

[43] In the case where a non-paying party fails to respond to a payment claim in the manner as provided in s. 6, sub-s. 6(4) deems such a party to have disputed the entire payment claim. And, this is the position of the appellant, that it has disputed the respondent's entire payment claim. Subsection 6(4) operates after the tenth working day of the receipt of the payment claim – see sub-s. 6(3).

[44] Where a payment response disputes in any way, the amount claimed in the payment claim, a payment dispute or a dispute over payment, arises. We would venture to say that in the case where no payment response was served, a payment dispute would deem to have arisen after the time stipulated in sub-s. 6(3) has lapsed.

[45] Section 7 gives the unpaid party and also the non-paying party the option of referring that payment dispute to adjudication, which right can only be exercised after the expiry of the ten working day period specified in sub-s. 6(3) that was referred to earlier:

> Right to refer dispute to adjudication
>
> 7. (1) An unpaid party or a non-paying party may refer a dispute arising from a payment claim made under section 5 to adjudication.
>
> (2) The right to refer a dispute to adjudication shall only be exercised after the expiry of the period to serve a payment response as specified under subsection 6(3).

[46] It is the payment dispute that is referred to adjudication; nothing else. Consequently, it is imperative that the payment dispute is one which properly falls within the ambit of CIPAA 2012. Where it does not, the adjudication decision reached is liable to be set aside under s. 15 on the ground that the adjudicator has acted in excess of his jurisdiction.

[47] Section 5 deals with payment claims. Although the term "payment claim" is not specifically defined in s. 5 or even s. 4, the term "payment" is defined in s. 4. In the recent Court of Appeal decision of *MRCB Builders Sdn Bhd v. Southern Builders (J) Sdn Bhd* [2018] 1 LNS 1508 [Civil Appeal No: J-02(NCVC)(A)-2136-10-2017], it was opined that the meaning of payment claim may be readily inferred as "a claim for payment for work done or services rendered under the express terms of a construction contract":

> [31] Although "payment claim" is not defined in section 4, the term "payment" is. It is defined to mean "a payment for work done or services rendered under the express terms of a construction contract." By necessary implication, a payment claim is, therefore, a claim for payment for work done or services rendered under the express terms of a construction contract.

[48] However, it is not just anyone who may make a payment claim under the CIPAA 2012 regime. Under s. 5(1), and consistent with the object and purpose of the Act, a payment claim may only be made by an "unpaid party" and it is made by the unpaid party serving on the non-paying party, a payment claim:

> Payment claim
>
> 5. (1) An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.

[49] The terms "unpaid party" and "non-paying party" are specifically defined in s. 4 of CIPAA 2012 as follows:

> "unpaid party" means a party who claims payment of a sum which has not been paid in whole or in part under a construction contract;

"non-paying party" means a party against whom a payment claim is made pursuant to a construction contract;

[50] The essential characteristic of the "unpaid party" is the fact it is a party who claims that it has not been paid, whether wholly or partially, a sum under a construction contract. Such a claim cannot be validly raised unless and until the timing for payment has lapsed and the obligation to pay, breached. So, if the parties had allowed themselves terms of credit or a certain period of time within which payment must be made, that period must be allowed to lapse before the claiming party describes itself as an "unpaid party". Where the time period or the date due for payment has lapsed, the party who has not been paid is then the "unpaid party." This unpaid party may now properly make a payment claim.

[51] The terms of sub-s. 5(2) supports this construction. Under para. 5(2)(a), an unpaid party is required to provide written details of *inter alia* the amount claimed and specify the due date for the payment of the amount claimed:

(2) The payment claim shall be in writing and shall include –

(a) the amount claimed **and due date for payment** of the amount claimed;

(b) details to identify the cause of action including the provision in the construction contract to which the payment relates;

(c) description of the work or services to which the payment relates; and

(d) a statement that it is made under this Act.

(emphasis added)

[52] In this appeal, these were the facts pertaining to the payment claim. It is not in dispute that the due date for payment of the sum specified in the interim progress certificate no. 29 is 6 December 2016. However, without waiting for this date to lapse, on 29 November 2016, the respondent issued and served on the appellant, a payment claim for the payment of the sum of RM1,743,471.44 as certified under interim payment certificate no. 29 dated 25 October 2016. As at 29 November 2016, the payment of this sum is not due.

[53] Since the payment of the sum is not due, the respondent cannot claim to be an "unpaid party". Quite logically, the respondent can only ascribe itself as an unpaid party after 6 December 2016, the due date for payment of interim progress certificate no. 29; even then, only where there is still non-payment after this date. Up until that date, the non-paying party is not as yet a non-paying party and cannot be so described.

[54] The adjudication regime is not intended to deal with *in futuro* payments. It is specific regime for recovery of payment; and there cannot be recovery without the due date for payment having passed and there is still non-payment.

[55] We do not find the decision in *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd & Another* (*supra*) and the comments by Ivan Loo and Lam Wai Loo, in *Construction Adjudication in Malaysia* to be of any particular relevance in this instant appeal. In *Terminal Perintis*, the complaint was on the lack of details or compliance with the requirements of sub-s. 5(2), that a valid cause of action including the relevant provision of the construction contract had not been set out in the payment claim, to which the learned judge made the following remarks:

> [59] No doubt the expression of a "cause of action" is used in section 5(2)(b) CIPAA but that is nothing more than saying that the Claimant must set out the basis of their claim in contract.

[56] Similarly, at p. 74 of their work, the learned writers, Loo and Lam were dealing with the matter of the contents of the payment claim as opposed to the status of the parties:

> 4.26 The unpaid party is required to state in his payment claim the amount claimed and the due date payment of the amount claimed. These requirements necessarily imply that every construction contract should provide an adequate mechanism for determining what, when and such terms, of if the contract does not provide an adequate mechanism for determining what, when and how payments are due under the construction contract, the default provisions on the terms of payment provided by section 36(1) of the CIPAA Act 2012 would be imported into the construction contract.
>
> 4.27 The unpaid party is only required to state in the payment claim the amount claimed to be due. It does not matter whether amount claimed may not in law be due. The right of an unpaid party to serve a valid payment claim is predicated on an amount being claimed, and not on there being an actual entitlement to the amount so claimed.

[57] That is not the complaint here. The issue in the present appeal concerns the critical status of the respondent as an unpaid party and the appellant as a non-paying party as only an unpaid party as defined under the Act can validly initiate the adjudication process under CIPAA 2012. And, as we have seen, the respondent was in no way an unpaid party on the date of the issue and service of the payment claim. Since it is not an unpaid party, the respondent could not validly invoke the adjudication mechanism and set that mechanism in motion.

[58] We do not consider the arguments raised by the respondent in opposing reliance on this ground to be of merit. The adjudication regime established under CIPAA 2012 contains clear guiding provisions on how the whole adjudication process is invoked, from commencement to conclusion.

For the mechanism to work efficiently, the clear terms of the adjudication process must be adhered to. CIPAA 2012 is not and cannot be argued to be a mechanism for speedy dispute resolution of payment disputes in all circumstances. Though the provisions are wide and extensive, it is only in the conditions and circumstances as prescribed. For the system to engender confidence, it must be a system where the elements of fair play to both the unpaid and non-paying parties are incorporated. The parties have a right to expect that the adjudication regime will not be resorted to or invoked until and unless certain conditions including contractual timelines have lapsed.

[59] The regime is not intended for all disputes between the parties; it is only for payment disputes where either the amounts claimed for work or services rendered are not met in full or in part, or where such payments are not regular or timely. Certainly in our present appeal, it is a material and relevant consideration and complaint in terms of jurisdiction.

[60] Hence, the first requirement that the payment dispute must state the due date for payment of the sum claimed; that at the time of initiation of the claim, it must be immediately obvious that the payment has been delayed or has not been forthcoming. This is part of the minimums required to trigger the adjudication regime. The merits of such a claim is a matter for the determination of the adjudicator using her inquisitorial powers.

[61] In fact, the learned authors, Chow Kok Fong, Lim Chong Fong and Oon Chee Kheng in the first book to be written on adjudication entitled "*Adjudication of Construction Payment Disputes in Malaysia: Navigating the Construction Industry Payment and Adjudication Act*", p. 227 [LexisNexis 2014] acknowledged that there are certain jurisdictional matters which are material and which affect the validity of the whole adjudication claim. Amongst them is the validity of the payment claim itself, that it is essential that such a claim is valid in order "to trigger the process which eventually leads to the adjudication proceedings. An invalid payment claim is not capable of crystallising a dispute which falls within the ambit of the Act."

[62] Thus, the "adjudication dispute" here that went to the adjudication was not one within the jurisdiction of the learned adjudicator to decide. Although this complaint was not raised in the adjudication proceedings, consistent with and applying the decision of the Federal Court in *View Esteem Sdn Bhd v. Bina Puri Sdn Bhd* (*supra*), this complaint raised at the High Court meant that the adjudication in the present appeal was a non-starter. We must add that although this was not argued by the respondent, we are not inclined to treat this aspect of jurisdiction as one which was a mere procedural irregularity or non-compliance which could have been waived.

[63] For the reasons explained, the appeal must therefore, be allowed on this ground alone. The orders of the High Court are hereby set aside.